APPEAL NO. 152184
FILING DECEMBER 29, 2015

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 16, 2015, with the record closing on September 28, 2015, in Austin, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to extensive tearing of the medial meniscus involving the posterior horn and mid body and extending into the anterior horn, a large flipped bucket handle tear of the lateral meniscus, moderate if not severe medial compartment arthritis, and mild patellofemoral compartment and lateral compartment arthritis of the left knee; (2) the appellant (claimant) reached maximum medical improvement (MMI) on June 30, 2014; (3) the claimant's impairment rating (IR) is one percent; (4) the employer tendered a bona fide offer of employment (BFOE) to the claimant; (5) the claimant did not have disability from May 14, 2014, through the date of the CCH resulting from an injury sustained on (date of injury); and (6) the first certification of MMI and IR from the designated doctor,(Dr. A), on November 6, 2014, did not become final under Section 408.123 and 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12).

The claimant appealed the hearing officer's determinations regarding the extent of the compensable injury, MMI, IR, BFOE, and disability, contending those determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The respondent (carrier) responded, urging affirmance of those determinations.

The hearing officer's determination that the first certification of MMI and IR from Dr. A on November 6, 2014, did not become final under Section 408.123 and Rule 130.12 was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part, reformed in part, and reversed and rendered in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), and that the carrier has accepted as compensable a fractured left first toe. The claimant testified he was injured when a coworker helping him carry a heavy steel bar caused the claimant to drop the bar on his left first toe.

EVIDENCE PRESENTED

At the CCH Claimant's Exhibits 1 through 8 were admitted into evidence, as were Carrier's Exhibits A through G. However, the decision incorrectly reflects that Claimant's Exhibits 1 through 7 were admitted, as were Carrier's Exhibits A through K. We reform the hearing officer's decision to show that Claimant's Exhibits 1 through 8 and Carrier's Exhibits A through G were admitted to reflect the correct exhibits offered by the claimant and the carrier and admitted into evidence at the CCH.

GOOD CAUSE FOR FAILURE TO ATTEND THE CCH

The hearing officer found that the claimant had good cause for his failure to appear at the July 16, 2015, CCH. We review good cause determinations under an abuse-of-discretion standard. Appeals Panel Decision (APD) 002251, decided November 8, 2000. The hearing officer's determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The hearing officer's finding that the claimant had good cause for his failure to appear at the July 16, 2015, CCH is supported by sufficient evidence. However, the hearing officer failed to make a conclusion of law or decision on the disputed good cause issue. Accordingly, we reverse the hearing officer's decision as being incomplete and render a new decision that the claimant had good cause for his failure to appear at the July 16, 2015, CCH. *See* APD 132159, decided December 4, 2013.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to extensive tearing of the medial meniscus involving the posterior horn and mid body and extending into the anterior horn; a large flipped bucket handle tear of the lateral meniscus; moderate if not severe medial compartment arthritis; and mild patellofemoral compartment and lateral compartment arthritis of the left knee is supported by sufficient evidence and is affirmed.

MMI/IR

The hearing officer's determinations that the claimant reached MMI on June 30, 2014, with a one percent IR are supported by sufficient evidence and are affirmed.

BFOE

The hearing officer determined that the employer tendered a BFOE to the claimant. The hearing officer specifically found that the employer's offers of employment dated April 21, 2014, and April 29, 2014, complied with Rule 129.6.

In evidence are the offers of employment from the employer dated April 21, 2014, and April 29, 2014. Both offers state the following in part:

The position will entail the following physical and time requirements:

- No standing for more than 1 hour per day
- No [kneeling]/squatting more than 1 hour per day
- No bending/[stooping] more than 2 hours per day
- No pushing/pulling more than 2 hours per day
- No twisting more than 2 hours per day
- No walking more than 1 hour per day
- No climbing stairs or ladders
- May not lift or carry objects more than 15 [pounds] for more than 8 hours a day
- Must wear splint/cast at work
- Must use crutches at all times
- No driving or operating heavy equipment
- No running
- Must take prescription medications

The claimant argues on appeal that both offers of employment fail to comply with Rule 129.6(c)(4); specifically, the offers merely list the restrictions given by the claimant's treating doctor rather than state the actual physical and time requirements that the position will entail. We agree.

Rule 129.6 sets out the requirements for a BFOE and provides in part:

> (c) An employer's offer of modified duty shall be made to the employee in writing and in the form and manner prescribed by the [Texas Department of Insurance, Division of Workers' Compensation]. A copy of the [Work Status Report (DWC-73)] on which the offer is being based shall be included with the offer as well as the following information:
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> * * * *
>
> (4) a description of the physical and time requirements that the position will entail
>
> * * * *

The Appeals Panel has held that the language in Rule 129.6 is "clear and unambiguous" and the rule "contains no exception for failing to strictly comply with its requirements." *See* APD 010301, decided March 20, 2001; APD 011604, decided

August 14, 2001; and APD 011878-s, decided September 28, 2001. In APD 090529, decided May 29, 2009, the Appeals Panel reversed and rendered a new decision that the employer had not made a BFOE because the written offer failed to provide a description of the physical and time requirements for the light assembly position offered pursuant to Rule 129.6(c)(4), given the work restrictions in the attached DWC-73. In the instant case neither offer of employment listed the physical and time requirements the offered position would entail, nor do they state the specific job position that was being offered. Instead, both offers of employment listed restrictions of what the job would not entail, which does not meet the requirement listed in Rule 129.6(c)(4). Accordingly, we reverse the hearing officer's determination that the employer tendered a BFOE to the claimant, and we render a new decision that the employer did not tender a BFOE to the claimant.

DISABILITY

The hearing officer determined that the claimant did not have disability from May 14, 2014, through the date of the CCH resulting from an injury sustained on (date of injury).

The claimant has the burden of proof to show that disability exists. APD 032579, decided November 19, 2003. Section 401.011(16) defines "[d]isability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." The Appeals Panel has stated on numerous occasions that the issues of BFOE and disability are distinct. APD 001143, decided July 3, 2000. As stated in APD 012077, decided October 23, 2001, disability concerns whether a claimant is unable to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury, while a BFOE is used to determine the amount of temporary income benefits due, if any.

It was undisputed that the claimant continued to work full time for the employer through April 18, 2014, and there was evidence that the employer had full-time work available for the claimant after April 18, 2014. The hearing officer found that the compensable injury was not a cause of the claimant's inability to obtain and retain employment at wages equivalent to his pre-injury wage. Sufficient evidence exists to support this finding. However, we note that Finding of Fact No. 10 contains a clerical error. The disability period at issue before the hearing officer as agreed to by the parties was May 14, 2014, through the date of the CCH. Finding of Fact No. 10 incorrectly states a disability period of May 14, 2015, through the date of the CCH. Accordingly, we reform Finding of Fact No. 10 to state the following to conform to the evidence and the disability period at issue at the CCH:

10. The compensable injury was not a cause of the claimant's inability to obtain and retain employment at wages equivalent to his pre-injury wage from May 14, 2014, through the date of the CCH.

Because there is sufficient evidence to support the hearing officer's determination that the claimant did not have disability from May 14, 2014, through the date of the CCH, we affirm that determination.

SUMMARY

We reverse the hearing officer's decision as being incomplete and render a new decision that the claimant had good cause for his failure to appear at the July 16, 2015, CCH.

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to extensive tearing of the medial meniscus involving the posterior horn and mid body and extending into the anterior horn; a large flipped bucket handle tear of the lateral meniscus; moderate if not severe medial compartment arthritis; and mild patellofemoral compartment and lateral compartment arthritis of the left knee.

We affirm the hearing officer's determination that the claimant reached MMI on June 30, 2014.

We affirm the hearing officer's determination that the claimant's IR is one percent.

We affirm the hearing officer's determination that the claimant did not have disability from May 14, 2014, through the date of the CCH.

We reform Finding of Fact No. 10 as follows below to conform to the evidence and the disability period at issue at the CCH:

The compensable injury was not a cause of the claimant's inability to obtain and retain employment at wages equivalent to his pre-injury wage from May 14, 2014, through the date of the CCH.

We reform the hearing officer's decision to show that Claimant's Exhibits 1 through 8 and Carrier's Exhibits A through G were admitted to reflect the correct exhibits offered by the claimant and the carrier and admitted into evidence at the CCH.

We reverse the hearing officer's determination that the employer tendered a BFOE to the claimant, and we render a new decision that the employer did not tender a BFOE to the claimant.

The true corporate name of the insurance carrier is **AMERISURE MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CINDY GHALIBAF
5221 NORTH O'CONNOR BLVD., SUITE 400
IRVING, TEXAS 75039-3711.

Carisa Space-Beam
Appeals Judge

CONCUR:

Veronica L. Ruberto
Appeals Judge

Margaret L. Turner
Appeals Judge